

NTSB Order No. EA-4957

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 27th day of February, 2002

Respondent.

Docket SE-16007

Respondent has appealed from the oral initial decision of Administrative Law Judge William R. Mullins, issued on November 8, 2000, following an evidentiary hearing.¹ The law judge affirmed an order of the Administrator, on finding that respondent had violated 14 C.F.R. 91.155(a) and 91.13(a) of the Federal Aviation Regulations ("FAR," 14 C.F.R. Part 91) in connection with a passenger-carrying Part 135 flight on November

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1, 1999.² We deny the appeal.

Respondent was the pilot of a Cape Smythe Air Service flight from Barrow to Atkasuk, Alaska. Three witnesses (two in the aircraft and one on the ground) testified to foggy conditions and limited visibility. The first low pass, they stated, narrowly avoided a light pole near the runway. They further testified that respondent landed on his second pass over the runway, after some difficulty lining up, and when he did land, touched down at least half the way down the runway. When it was clear that he would not be able to stop in the space available, respondent gunned one engine and did a 180-degree turn on the runway. There was no damage to the aircraft or to its passengers; they were, however, considerably shaken by the experience. When respondent returned to Barrow he resigned. He testified, in sum, that he had the required visibility at all times, but that the weather and runway conditions made the landing difficult.

The law judge found, among other things, that "if there's a mile visibility and the runway lights were on and he's right down over it, there's no way he could have missed it. There's no way he could have landed long and been watching this VASI light."

² Section 91.155(a) provides, as pertinent, that no person may operate an aircraft under visual flight rules (VFR) when flight visibility is less, or at a distance from clouds that is less than that prescribed for the corresponding altitude and class of airspace. In this case, the distance prescribed was 1 mile. Section 91.13(a) prohibits careless or reckless operations that endanger the life or property of another. The Administrator has charged that respondent was careless.

Transcript (Tr.) at 285.³

On appeal, respondent challenges the law judge's findings of fact as not supported by substantial, reliable evidence. We disagree. What the law judge did was reject respondent's version of events in favor of that presented by three disinterested parties. It is well settled that credibility conclusions are for the law judge to make. We will not overturn them without good reason. Administrator v. Smith, 5 NTSB 1560, 1563 (1987), and cases cited there (resolution of credibility issues, unless made in an arbitrary or capricious manner, is within the exclusive province of the law judge).

There is more than adequate evidence on which to conclude that respondent violated § 91.155(a) and operated the aircraft carelessly. Despite some (not unexpected) variations in the eyewitness testimony, it is clear that respondent had nowhere near the 1 mile required visibility when he landed. All his explanations notwithstanding (e.g., that the first overflight was merely that, not a landing attempt, and that gusting winds caused a less than desirable landing), the fact remains that the record establishes he landed in less than required visibility and there is no emergency alleged or proven that would excuse him doing so. Respondent's obligation is to locate a place to land lawfully and

³ There is some confusion in terminology, but it is clear from the transcript that the law judge meant that, had he had the required visibility, respondent would have seen all the runway lights and flight aids (glide slope indicator) and could have landed normally.

safely. Atqasuk that night was not the place.⁴ Respondent could have returned to Barrow if necessary, or if no other safe locations could be found, respondent could have made an emergency landing at Atqasuk.

Furthermore, respondent's efforts to categorize the weather conditions as whiteout do not help his case. The regulation requires 1 mile visibility and flight at least 1 mile from clouds. The regulation does not distinguish between fog cloud and snow cloud, or between horizontal and vertical visibility. VFR flight and landing require clear conditions for sight. Respondent did not have them that night.

Respondent also argues that the law judge relies too heavily on unreliable statements that, when respondent returned to Barrow, he told the chief pilot that he was tired of flying in these conditions. The law judge interpreted this as some sort of admission against interest, in view of the fact that aviation in Alaska in the winter will routinely involve ice, fog and snow. Tr. at 286. Although, again, this is a credibility assessment we have no basis to reverse, this finding is not necessary to a conclusion that respondent violated the cited regulations.

Finally, respondent challenges the law judge's rejection of his ASRS report.⁵ We agree with the Administrator that

⁴ The weather apparently changed dramatically between the time he got the weather report and when he arrived at Atqasuk.

⁵ Aviation Safety Reporting System. Respondent did not raise the issue until after the law judge had completed issuing his oral decision.

respondent's failure to raise the issue earlier, preferably in his answer, or at a minimum to advise the Administrator of the issue, cannot be countenanced, as it denies the Administrator the opportunity to prepare her case. Respondent's citation to a case where this law judge allowed otherwise is of no consequence.

Furthermore, we believe that respondent's ASRS filing would not have had the effect of waiving sanction because respondent's actions here appear in our view to have been a purposeful disregard of safety. Administrator v. Ferguson, NTSB Order No. EA-4457 (1996) at 3-4 (waiver of sanction requires a finding that the violation was inadvertent and "not deliberate"). That is, we disallow sanction waiver for conduct that approaches deliberate or intentional conduct in the sense of reflecting a "wanton disregard of the safety of others" or a "gross disregard for safety."

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied; and
2. The 180-day suspension of respondent's certificate shall begin 30 days after the service date indicated on this opinion and order.⁶

BLAKEY, Chairman, CARMODY, Vice Chairman, and HAMMERSCHMIDT, GOGLIA, and BLACK, Members of the Board, concurred in the above opinion and order.

⁶ For the purpose of this order, respondent must physically surrender his certificate to a representative of the Federal Aviation Administration pursuant to 14 C.F.R. 61.19(f).